No. 12,239

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE MARION WILFONG,
Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,
United States Attorney.
JOSEPH KARESH,
Assistant United States Attorney,
Post Office Building, San Francisco 1, California,
Attorneys for Appellee.

PRINTED WALLACE PRINTING CO., SAN FRANCISCO

Subject Index

Table of Authorities Cited

Cases

Statutes

No. 12,239

IN THE

United States Court of Appeals

For the Ninth Circuit

GEORGE MARION WILFONG,
Appellant,

vs.

E. B. SWOPE, Warden, United States Penitentiary, Alcatraz, California,
Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the United States District Court for the Northern District of California, herein after called "the Court below", denying appellant's petition for writ of habeas corpus. (Tr. 27-29.) At the time the action was brought the Court below had jurisdiction over the habeas corpus proceedings under Title 28 U.S.C.A., Sections 451, 452 and 453, now superseded by Title 28 U.S.C.A., Sections 2241, 2243 and 2255. Jurisdiction to review the order of the Court below denying the petition is now conferred upon this honorable Court by Title 28 U.S.C.A., Section 2253, but, prior to September 1, 1948, such jurisdiction was conferred by Title 28 U.S.C.A., Sections 463 and 225.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary, at Alcatraz, California, filed a petition for writ of habeas corpus (Tr. 2-6), and the Court below issued an order to show cause (Tr. 10). Thereafter the appellee filed a return to order to show cause (Tr. 11-26). The matter was then submitted and the Court below filed the following written order denying petition for writ of habeas corpus:

> "I am convinced, from a study of the documents on file herein, consisting of the Petition for Writ of Habeas Corpus, the Order to Show Cause, and the Return to Order to Show Cause, and attached Exhibits, that the petitioner has failed to state a cause of action. This is the second Petition for Writ of Habeas Corpus filed herein by the petitioner; the first case being numbered 23176-G. In this case, the writ issued, and after hearing, United States District Judge Louis E. Goodman found that the conviction and sentence of the petitioner before the United States District Court for the Western District of Michigan was valid, and discharged the writ. On appeal from this Order Discharging the Writ, the Court of Appeals for the Ninth Circuit found that the conviction was valid but that the sentence was void, because it was imposed in the absence of petitioner's counsel. See *Wilfong v. Johnston,* 156 Fed. (2d) 507. Thereafter, pursuant to the mandate of the Court of Appeals for the Ninth Circuit, Judge Goodman remanded the petitioner to the jurisdiction of the trial court for judgment and sentence upon the verdict of guilty heretofore returned against him. Petitioner moved for a new

trial, and the motion was denied. Thereafter he was resentenced, and from the order of resentence petitioner appealed to the United States Court of Appeals for the Sixth Circuit. On appeal, the order of the trial court was affirmed. See 162 Fed. (2d) 718, certiorari denied, 333 U.S. 846; rehearing denied, 333 U.S. 878.

"The gravamen of petitioner's basic complaint, in our case at bar, is that the trial court lost jurisdiction to impose a new sentence, but this contention was disposed of adversely to petitioner by our Circuit Court of Appeals in its decision in *Wilfong v. Johnston,* supra. Petitioner's additional complaint that the trial court failed to listen to oral argument in support of his motion for a new trial is not a ground cognizable in habeas corpus. Another contention advanced by the petitioner herein is, that habeas corpus should lie because the order of resentence did not comply with Rule 32 (b) of the Federal Rules of Criminal Procedure, which provide, in pertinent part, as follows:

> 'A judgment of conviction shall set forth the plea, the verdict or findings, and the adjudication and sentence. * * *'

"This contention is likewise without merit because when the order of resentence is read, together with the judgment first entered, there can be no question that the items of information required by the rule are set forth. See *Sanders v. Johnston* (C.C.A. 9), 165 Fed. (2d) 736, 737.

"Petitioner further contends that he was unconstitutionally denied the opportunity to make a motion for new trial within three days after ver-

dict (as required by the Federal Rules in effect at that time) because judgment was pronounced in the absence of his counsel, with the result that his motion made subsequently could not be heard by the trial judge, who was then deceased. After petitioner was remanded to the trial court for judgment and sentence, Judge Picard, sitting in place of the deceased trial judge, expressed some doubt as to his jurisdiction to entertain a motion for new trial but assuming jurisdiction, nevertheless, denied the motion, with prejudice. The record discloses that Judge Picard had the complete trial record before him. When a trial has been reported stenographically so that a record is preserved there can be no question of the power of the trial judge's successor to rule on a motion for new trial. See *Meldrum v. United States* (C.C.A. 9), 151 Fed. 177, 182.

"Finally, it should be noted that in all the proceedings, after the petitioner was remanded to the trial court, he was represented by counsel, and that on appeal to the Court of Appeals for the Sixth Circuit this counsel likewise represented him and presented substantially the same contentions advanced in the instant application.

"In view of the foregoing, It Is Hereby Ordered that the Petition for Writ of Habeas Corpus be, and the same is, Dismissed, and the Order to Show Cause be, and the same is, Discharged.

Dated: March 23rd, 1949.

Michael J. Roche,
United States District Judge."

(Tr. 27-29.)

From this latter order appellant now appeals to this honorable Court. (Tr. 30-31.)

QUESTION.

Was the appellant entitled to his discharge from the custody of the appellee?

CONTENTION OF APPELLEE.

The answer to the above stated question is "No".

ARGUMENT.

The facts of this case and the contentions of appellant are clearly set forth in the order of the Court below denying petition for writ of habeas corpus and, accordingly, need no amplification by the appellee. The reasoning of the Court below in its order, and the authorities cited therein, are a complete answer to the contentions of the appellant. Appellee, therefore, adopts them *in toto* as his argument on this appeal.

CONCLUSION.

In view of the foregoing, it is respectfully submitted that the order of the Court below, in denying

petition for writ of habeas corpus, is correct and should be affirmed.

Dated, San Francisco, California,
July 12, 1949.

FRANK J. HENNESSY,
United States Attorney,
JOSEPH KARESH,
Assistant United States Attorney,
Attorneys for Appellee.